

SERVICE DATE – LATE RELEASE AUGUST 3, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34890

PYCO INDUSTRIES, INC.—FEEDER LINE APPLICATION—  
LINES OF SOUTH PLAINS SWITCHING, LTD. CO.

STB Finance Docket No. 34802

PYCO INDUSTRIES, INC.—ALTERNATIVE RAIL SERVICE—  
SOUTH PLAINS SWITCHING, LTD. CO.

STB Finance Docket No. 34870

PYCO INDUSTRIES, INC. v. SOUTH PLAINS SWITCHING, LTD. CO.

STB Finance Docket No. 34889

PYCO INDUSTRIES, INC.—ALTERNATIVE RAIL SERVICE—  
SOUTH PLAINS SWITCHING, LTD. CO.

STB Finance Docket No. 33753 (Sub-No. 1)<sup>1</sup>

SOUTH PLAINS SWITCHING, LTD. CO.—ACQUISITION EXEMPTION—  
BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: August 2, 2006

In a motion filed in all of these proceedings on July 17, 2006 (the motion), PYCO Industries, Inc. (PYCO), as the applicant, petitioner, or complainant, has asked the Board to take several actions to prevent South Plains Switching, Ltd. Co. (SAW) from evading the Board's orders and authority. SAW filed an opposition to the motion on July 31, 2006, the same day on which PYCO submitted a "Statement Concerning Crossing and Opposition to KJRY Reply to Reply." We will grant some of the requested relief in whole or in part, deny some of the requested relief, and amend the procedural schedule in STB Finance Docket No. 34890.

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<sup>1</sup> These proceedings are not consolidated. A single decision is being issued for administrative convenience. In view of the large number of proceedings in which this motion was filed, we will not list all of the pleadings filed or agency decisions issued to date in the various proceedings.

## BACKGROUND

To resolve a measurable deterioration in the rail service provided to PYCO by SAW, the Board, in decisions served on January 26, February 24, and June 21, 2006, in STB Finance Docket No. 34802, authorized the provision of alternative rail service to PYCO by West Texas & Lubbock Railway Company, Inc. (WTL), over the lines of SAW, in Lubbock, TX. That authorization is statutorily limited to 270 days and will expire on October 23, 2006.<sup>2</sup> In connection with the authorization, the Board ordered amendments to operating protocols entered into by SAW and WTL to facilitate safe operations while the two carriers operate on SAW's lines. The amended operating protocols assign separate hours of operation to WTL and to SAW.

In STB Finance Docket No. 34889, PYCO filed on July 3, 2006, a new request for authorization of alternative service, to begin upon the expiration of the current alternative service authorization. The new request is based on two statutory provisions, 49 U.S.C. 10705(a) and 11102, and regulations at 49 CFR 1147.

PYCO also sought a long-lasting solution to its service difficulties by filing on May 5, 2006, in STB Finance Docket No. 34844, PYCO Industries, Inc.—Feeder Line Application—South Plains Switching, Ltd. Co., an application to purchase SAW's rail lines under the feeder line provisions of 49 U.S.C. 10907 and 49 CFR 1151. In a decision served on June 2, 2006, the Director of the Office of Proceedings (the Director) rejected as incomplete PYCO's application to purchase the entirety of SAW's rail lines ("All-SAW option") and its alternative request to acquire a portion of SAW's rail lines to allow PYCO to provide rail service to itself and to two other shippers located in close proximity to one of PYCO's two plants in Lubbock ("Alternative Two"). The rejection was without prejudice to PYCO's filing a new application.

SAW transferred on June 12, 2006, the real estate, tracks, and certain other property interests in portions of its rail lines to Choo-Choo Properties, Inc. (Choo-Choo), a real estate-investment company. Some of these property interests were leases and other agreements between various predecessor railroads of SAW and the previous owners of PYCO's facilities. Mr. Larry Wisener, the sole officer and shareholder of Choo-Choo, formerly was SAW's president and general manager and is married to Mrs. Delilah Wisener, who is the owner and current general manager of SAW. In a letter dated July 6, 2006, Choo-Choo notified PYCO that Choo-Choo was rescinding eight PYCO-related agreements beginning on August 5, 2006. PYCO contends that cancellation of these agreements would prevent PYCO from shipping by rail and even from operating its cottonseed-processing plants.

On June 14, 2006, PYCO filed in STB Finance Docket No. 34890 a new feeder line application for Alternative Two. The Board accepted that application as complete and set a procedural schedule in a decision served on July 3, 2006 (July 3 decision).

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<sup>2</sup> The basis for the authorization of alternative service in STB Finance Docket No. 34802 is 49 U.S.C. 11123 and 49 CFR 1146.

In STB Finance Docket No. 34870, PYCO filed on April 19, 2006, a complaint in which it alleges that SAW violated various provisions of the Interstate Commerce Act, as amended. PYCO seeks civil penalties and other relief for the deterioration in rail service that was the basis for the authorization of alternative rail service in STB Finance Docket No. 34802. SAW has moved to dismiss the complaint and also has filed an answer. The Board will handle this complaint in a separate decision.

In STB Finance Docket No. 33753 (Sub-No. 1), PYCO filed on June 19, 2006, a petition for revocation of the acquisition exemption by which SAW purchased its rail lines from The Burlington Northern and Santa Fe Railway Company in 1999.<sup>3</sup> Under 49 U.S.C. 10502(d), the Board has 90 days from the filing of the petition to decide whether to begin a revocation proceeding.

#### THE MOTION

In its motion, PYCO seeks orders:<sup>4</sup>

- enforcing the amended operating protocols in STB Finance Docket No. 34802 that govern operations on SAW's lines during the period of alternative service by compelling SAW to stop operating in its yard and on the wye track south of its yard during the hours assigned to WTL for PYCO's switching (STB Finance Docket No. 34802);

- voiding any sales of property to Choo-Choo or any other third party and rescinding Choo-Choo's cancellations of leases and other agreements that affect PYCO (in STB Finance Docket Nos. 34802, 34890, and 34899);

- enjoining SAW from making any further sales or transfers of its rail properties or from terminating any agreements or licenses aimed against PYCO or any other shipper that files a statement in support of a feeder line application prior to the conclusion of the feeder line proceeding (in STB Finance Docket No. 34890);

- preserving the status quo in PYCO's complaint proceeding (STB Finance Docket No. 34870); and

- authorizing PYCO's submission of new evidence in support of its petition to revoke the acquisition exemption (STB Finance Docket No. 33753 (Sub-No. 1)).

We discuss these requests below.

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<sup>3</sup> The Burlington Northern and Santa Fe Railway Company has changed its name to BNSF Railway Company. Both entities are referred to as BNSF.

<sup>4</sup> PYCO also seeks an order staying retaliatory actions by SAW, but this request is subsumed in its other requested relief.

## DISCUSSION AND CONCLUSIONS

### 1. Enforcing Operating Protocols.

PYCO claims that SAW routinely operates in SAW's yard and on the wye track south of SAW's yard between 7 a.m. and 10 a.m., hours that are allotted to WTL under the amended operating protocols.<sup>5</sup> PYCO states that SAW's operations during those hours impede PYCO from operating switching equipment on PYCO tracks that are adjacent to SAW's yard. As a consequence of SAW's operations in the morning hours, WTL has had to limit its operations in the SAW yard until 2 p.m., according to PYCO.

SAW replies that PYCO is not entitled to operate its trackmobile (switching equipment) over SAW property, that any PYCO presence on SAW's tracks is trespassing, and that PYCO's newly extended shop track encroaches (through insufficient clearance) on tracks that are on SAW's property. (SAW also claims that the extended shop track encroaches upon track that SAW has transferred to Choo-Choo.) In addition, SAW contends that the four hours allotted under the amended protocols (10 a.m. to 2 p.m.) are insufficient for SAW to provide adequate rail service to the other shippers located on its tracks. SAW admits that it has operated outside the allotted hours when it "was clear" that WTL was not working in SAW's yard during the morning hours.

It is not the proper role of the Board to be the arbiter of operational details such as the amount of clearance between PYCO's newly extended shop track and SAW's rail yard, whether PYCO has encroached upon SAW property, and exactly what hours each carrier should have unless Board action is needed to ensure the carriers' ability to serve their respective rail customers. Here, it appears that, to provide adequate rail service, WTL relies in part upon PYCO's operating a trackmobile on PYCO property. SAW has been interfering with those operations. Thus, the protocol will be amended to clarify that PYCO has the right to operate its own equipment (trackmobile) on its own property. If the safe operation of PYCO's trackmobile on PYCO property requires that rail cars not be stored on the wye to the south of SAW's yard, SAW shall not store any rail cars on the wye.

To further promote safe operations, we will also amend the operating protocols to require SAW, WTL, and PYCO to participate in a daily (Monday through Friday) telephone conference call, prior to 7 a.m., in which the three parties work out a schedule for morning operations (7 a.m. to 10 a.m.) that will permit WTL to serve PYCO; PYCO to operate its trackmobile on PYCO property; and SAW to serve its customers. BNSF is welcome to participate in the

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<sup>5</sup> Of the shippers located on SAW's lines, PYCO ships the largest number of carloads. Under the amended operating protocols, WTL is allotted exclusive use of SAW's yard (to serve PYCO) from 7 a.m. to 10 a.m. and from 2 p.m. to 7 p.m. WTL also is permitted to use the yard overnight (when SAW does not operate), from 7 p.m. to 7 a.m.

conference call, as its rail yard is in the vicinity and its operations also may be affected. To facilitate this required daily telephone conference, we will require SAW promptly to furnish to WTL, BNSF, and PYCO the names and telephone numbers of the appropriate SAW personnel to participate in the conference, and SAW shall make those personnel available and direct them to participate.

2. Voiding Transfers of SAW Property to Choo-Choo and Enjoining Future Transfers and Rescissions.

PYCO argues that SAW transferred certain real estate and a segment of the wye track south of SAW's yard, plus SAW's interest in certain agreements and leases concerning PYCO, as a means to evade the Board's authority over that property and specifically to evade our jurisdiction to authorize the sale of the property under the feeder line provision. PYCO contends that such a transfer, accomplished when SAW was on notice that PYCO sought to acquire SAW's rail lines, was contrary to Board and court precedent concerning the analogous "forced sale" provision governing an offer of financial assistance (OFA), at 49 U.S.C. 10904.

SAW argues that the property interests it transferred to Choo-Choo are not needed for WTL or SAW's rail operations, and if such service over the transferred track should become necessary, SAW has retained an operating right over it. Consequently, SAW contends that the Board does not have jurisdiction over the sale of the property.

SAW has been on notice that PYCO intends to purchase either the entirety or a specific portion of SAW's rail lines since the filing of PYCO's original feeder line application in STB Finance Docket No. 34844, on May 5, 2006. While the Director rejected that application, effective June 2, 2006, the Director's decision was without prejudice to PYCO filing a new application that would remedy the deficiencies in its original application.

Thus, SAW was, or should have been, aware in May 2006, before the sale to Choo-Choo took place, of the possibility that PYCO could file a new application and that SAW could be required to sell its rail lines under the feeder line provision. Moreover, given the history of these proceedings, SAW was well aware of PYCO's dependence on reliable rail service, and the likelihood that therefore PYCO would file a new feeder line application.

Indeed, just 2 days after SAW's purported transfer of property to Choo-Choo, PYCO submitted, on June 14, 2006, an application to purchase the portion of SAW's rail lines described as Alternative Two. This new application was submitted less than 2 weeks after the rejection of PYCO's original application.<sup>6</sup>

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<sup>6</sup> The Board accepted this new application as complete in the July 3 decision. Subsequently, Keokuk Junction Railway Company (KJRY) informed the Board that, under 49 CFR 1151.2(c), KJRY intends to file a competing application to purchase either the entirety of (continued...)

The marital connection between the owners of SAW and Choo-Choo belies any attempt to portray the two entities as separate and independent. Moreover, the record shows that Choo-Choo purchased the property for possible future construction of a facility that it might lease to SAW, rather than for any immediate transportation purpose. These facts lead us to conclude that SAW sold the real estate, track, and related leases and agreements on portions of its lines to prevent that property from being acquired in a feeder line sale—in other words, to evade the Board’s authority over the sale of that property.

In the analogous context of an OFA, which under 49 U.S.C. 10904 requires the sale for continued rail use of a rail line authorized for abandonment, the Board has voided similar transfers of interests in leases and agreements that were designed to shield railroad property from the Board’s authority. Railroad Ventures, Inc.—Acquisition and Operation Exemption—Youngstown & Southern Railroad Company, STB Finance Docket No. 33385 (STB served Oct. 4, 2000) (Railroad Ventures), *aff’d*, Railroad Ventures, Inc. v. STB, 299 F.3d 5223 (6th Cir. 2003). The Board disallowed the transfers and authorized the offeror to buy the entirety of the owner’s property rights in the rail line, less certain transferred rights to which the purchaser had acquiesced by adjusting its offer to exclude those rights.

SAW took a narrow approach to the term “rail line” in the feeder line provision. Even if SAW may not have used all of the real estate, track, and other property interests at issue to provide rail service to the shippers on these rail lines, a feeder-line purchaser may intend to use the property to serve the lines’ shippers in the future, and it is the purchaser’s intended use that is critical. *See, e.g., Brotherhood of Locomotive Eng’rs v. STB*, \_\_\_ F.3d \_\_\_, No. 05-1233 (D.C. Cir. July 25, 2006) (in determining whether track was excepted from Board authority under 49 U.S.C. 10906, the previous owner’s use as switching track was not dispositive; the purchaser’s prospective use of the track controlled its characterization); City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005).

Therefore, we will void any transfers of any of SAW’s rail properties, including the transfers made to Choo-Choo, that occurred after May 5, 2006 (filing of original feeder line application). Likewise, we enjoin any such transfers by SAW during the pendency of PYCO’s new feeder line application (and any competing applications that may be filed), until the closing of the sale or the Board’s receipt of notice that the feeder line applicant has decided not to go through with the sale.

Our voiding of the transfer to Choo-Choo of SAW’s interest in leases and agreements related to PYCO means that Choo-Choo never was the lawful owner of interests in those

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(...continued)

SAW’s rail lines or that portion known as Alternative Two. In a pleading submitted on July 31, 2006, PYCO opposed KJRY’s July 21, 2006, submission (an e-filing) as an impermissible “reply to a reply.” The KJRY submission clarifies the scope of its forthcoming feeder line application and will be accepted into the record.

leases/agreements and therefore that Choo-Choo lacked authority to rescind them. Accordingly, we will void Choo-Choo's rescissions, a list of which is attached to PYCO's motion.

In light of the above, SAW remains the owner of interests in the agreements that Choo-Choo attempted to rescind. PYCO's witness, Robert Lacy, states that the rescissions would essentially shut down PYCO's ability to ship by rail or even to operate its plant. According to Mr. Lacy, PYCO still is processing and shipping cottonseed from the 2005 harvest and the monetary losses from shutting down its rail-dependent operations and its Plant No. 1 would be very high. As a consequence, the value of SAW's rail lines would be similarly diminished by virtue of the loss of PYCO's rail shipments. Accordingly, to prevent a diminution in the value of the rail properties sought to be acquired in the pending feeder line application, we will order SAW not to cancel any leases or agreements that concern PYCO or any other shipper on its lines, until the closing of any sale authorized by the Board under the feeder line provision or the Board's receipt of notice that the applicant(s) receiving authority to purchase the lines will not exercise the authority to purchase SAW's rail lines.

3. Preserving the Status Quo in the Complaint Proceeding. In broadly asking for an order preserving the status quo, PYCO apparently seeks to prevent any additional financial losses from actions by SAW or Choo-Choo that would harm its ability to ship products or to operate its cottonseed processing plants. We believe that this has been accomplished by our voiding transfers of property to third parties, canceling the rescission of agreements and leases that concern PYCO, and enjoining any future transfers or rescissions during the pendency of the feeder line proceeding.

4. The Submission of New Evidence in the Revocation Proceeding. In its opposition, SAW does not give any reasons why it objects to PYCO's motion to submit newly tendered evidence (attached to its motion) in support of its revocation petition. Accordingly, the newly tendered evidence is accepted into the record in STB Finance Docket No. 33753 (Sub-No. 1).

In conclusion, we will void SAW's transfers of property in its rail lines to Choo-Choo or other third parties, void Choo-Choo's rescission of leases and agreements concerning PYCO, and, during the pendency of the feeder line application(s) for any portion of SAW's rail lines, enjoin SAW from making any such transfers or rescissions. In addition, the newly tendered evidence is admitted into the record in the complaint proceeding.

#### OTHER MATTERS

In a decision served on July 21, 2006, in STB Finance Docket No. 34890, KJRY's request for an extension of time to file a competing feeder line application was granted in part. Consequently, the procedural schedule in that docket must be adjusted to reflect a likely forthcoming competing application and to minimize the need for any party to file the same type

of pleading twice. The revised schedule set forth below will also respond to specific requests of PYCO and of SAW concerning due dates for future pleadings.<sup>7</sup>

In a letter filed on July 24, 2006, SAW has asked that any comments and verified statements in response to KJRY's competing application be due 14 days after KJRY files its application, or on August 18, 2006. However, August 18, 2006, is the day that the Director's decision accepting or rejecting KJRY's competing application is due to be served.<sup>8</sup> Accordingly, if SAW or any other party wishes the Director to be aware of its views on KJRY's application prior to the Director making a decision whether to accept it, those pleadings must be filed on or by August 14, 2006. If KJRY's application is accepted as complete, any party will have until August 24, 2006, to file comments and verified statements responding to KJRY's application. There is no need for a party to file comments both before and after the Director's forthcoming decision. However, any party is free to file both times if it so chooses.

The July 3 decision accepting PYCO's new feeder line application placed PYCO in the position of possibly having to file two final replies to SAW's responses to PYCO's application.<sup>9</sup> In a Reply to SAW's Letters of July 14, 2006, that was filed on July 18, 2006, PYCO requested a procedural schedule that would permit it to file only one final reply. We agree, and will set a date for final replies that accommodates the possibility of a competing application. Therefore, PYCO's final replies to any verified statements or comments concerning PYCO's application, and KJRY's final replies to any verified statements or comments concerning KJRY's competing application, will be due on or by September 7, 2006.

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<sup>7</sup> As established in previous decisions, verified statements and comments on PYCO's new application were due on August 2, 2006; KJRY's competing application, if any, was due on August 4, 2006. Also due on August 4, 2006, were SAW's answers to PYCO's interrogatories and document requests. And, as previously established, if PYCO wishes to amend its valuation of the rail lines in light of discovery responses, the amended valuation is due 7 days after the latest of three listed events, and that due date is expected to be August 11, 2006. Any comments and verified statements concerning PYCO's amended valuation (if filed) will be due within 7 days of the filing of an amended valuation. That due date is expected to be August 18, 2006.

<sup>8</sup> Under 49 CFR 1151.2(c)(2), the Director has 15 days to accept or reject a competing feeder line application. If, as expected, KJRY files a competing application on August 4, 2006, the Director's acceptance/rejection decision would be due to be served on August 18, 2006 (August 19 is a Saturday).

<sup>9</sup> As PYCO explains, the July 3 decision provides that PYCO's final reply is due either on August 14, 2006, or 15 days after SAW's comments (if any) on any discovery-based modifications to the valuation of the rail lines made by PYCO. However, on August 14, PYCO will not know if SAW will be replying on August 18, 2006, to PYCO's modifications (which will be filed on August 11, 2006). PYCO contends that this schedule would force PYCO to prepare two replies, one for filing on August 14 and one for filing 15 days after August 18, 2006.



As explained in earlier decisions, we have adjusted the procedural schedule from that provided in the regulation at 49 CFR 1151 to permit the consummation of any feeder line sale prior to the October 23, 2006 expiration of alternative rail service.

It is ordered:

1. The operating protocols attached to WTL's February 8, 2006 request, as modified by earlier decisions, are further modified by adding the following terms, which shall apply for the same duration:

a. To assure the provision of adequate rail service to PYCO, PYCO has the right to operate its own equipment (trackmobile or the like) on PYCO property.

b. Prior to 7 a.m. each weekday, personnel of SAW, WTL, and PYCO shall participate in a conference telephone call in which they discuss and arrange for the use, during the hours of 7 a.m. through 10 a.m., of SAW's yard, the wye south of SAW's yard, and PYCO's property (including its shop track) in a manner that promotes safe operations. BNSF may participate if it chooses. SAW shall promptly furnish to WTL, PYCO (and BNSF, if BNSF participates in the call) the name(s) and telephone number(s) of SAW personnel who will participate in the daily conference calls and shall direct the named person(s) to participate.

2. Any transfers of SAW's rail property, including transfers made to Choo-Choo, that occurred after May 5, 2006, are void, and SAW remains the owner of any such property that was transferred, including, but not limited to, real estate, track, and interests in leases and agreements concerning PYCO or its predecessors.

3. Any rescissions of leases and agreements concerning PYCO, made by Choo-Choo or SAW after May 5, 2006, are void.

4. SAW may not transfer any property interests in, or rescind any leases or agreements concerning PYCO or any shipper that supports a feeder line application to purchase all or any part of SAW's rail lines, until either a purchase under 49 U.S.C. 10907 is consummated or all feeder line applicants whose feeder line applications are approved have notified the Board in writing that they do not wish to go forward with purchasing all or any part of SAW's rail lines.

5. The evidence tendered with PYCO's motion is accepted into the record in STB Finance Docket No. 33753 (Sub-No. 1).

6. KJRY's July 31, 2006 submission in STB Finance Docket No. 34890 is accepted into the record of that proceeding.

7. The procedural schedule in STB Finance Docket No. 34890 is modified as follows:

a. Any party may file verified statements and comments responding to a competing application (to be filed by KJRY), on or before August 24, 2006.

b. PYCO's final replies to any verified statements or comments responding to PYCO's application shall be filed on or before September 7, 2006.

c. KJRY's final replies to any verified statements or comments responding to KJRY's competing application shall be filed on or before September 7, 2006.

8. This decision is effective on its service date.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams  
Secretary